In the Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 972 and 973

JOSEPH MUSTACCHIO and GERARDO RESTAINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1968. The petitions for writs of certiorari were filed on January 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet." references herein refer to the petition in No. 972.

QUESTIONS PRESENTED

1. Whether there was plain error in the court's instructions.

2. Whether petitioner Mustacchio was denied the effective assistance of counsel by the refusal of the trial judge to grant an additional continuance on the day set for trial.

3. Whether the sentence of five years' imprisonment imposed on petitioner Restaino should have been reduced on appeal.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of attempting to bribe federal agents with intent to influence an official act, in violation of 18 U.S.C. 201(b). Petitioner Mustacchio was sentenced to seven years' imprisonment and petitioner Restaino to five years' imprisonment. The court of appeals affirmed (Pet. App. A).

In the early morning hours of August 10, 1967, in Nutley, New Jersey, F.B.I. agents stopped petitioner Restaino's car and arrested him for possession of goods stolen from an interstate shipment. Petitioner Mustacchio (who had been following Restaino in another car) approached agents Lally and Bates and asked whether they could "make a deal to get [Restaino] off the hook" (35b-38b, 130b-131b).[2] Mus-

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[2] "b" references are to the appendix for the United States in the court below, containing substantial excerpts from the

tacchio offered to let Bates and Lally "name your price" (131b). Mustacchio indicated that he did not have a large amount of money with him but that he would go to a nearby town and get it (39b, 132b). After some further discussion in Restaino's presence, Mustacchio offered to pay each of the agents $500 (39b, 132b-133b). Restaino was then taken to the Newark Office of the F.B.I. He told agent Lally that he had doubts that Mustacchio could raise the money but stated that he (Restaino) would give $500 each to Lally, Bates and the United States Attorney if he was set free without being charged (133b-134b). At about 5:30 a.m. Mustacchio appeared at the F.B.I. office and met in an interview room with Restaino and agents Lally and Bates. Mustacchio said that he had the money and offered to conclude the deal (135b). Lally stated that, while they had been waiting, Restaino had offered $500 each for himself, agent Bates and the United States Attorney. Mustacchio replied that he thought the deal was for $1,000, and that was the amount he had raised. He gave ten $100 bills to Restaino, telling the agents that that was all he and Restaino could get (136b). Lally asked Mustacchio to leave the room so that the agents could finish the interview with Restaino. Mustacchio left and, after closing the door, was arrested for bribery by other agents (137b). Restaino then told agents Bates and Lally that he would obtain the additional $500 if they would accept the $1,000 and release him. He said

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testimony at trial; "a" references are to petitioners' appendix in the court below. A copy of each of these appendices is on file with the Clerk of this Court.

there would be no problems for the agents and requested them to destroy their records of his arrest. He then handed the $1,000 to Lally and was immediately arrested for bribery (136b-137b).

2. In his initial charge, the district judge instructed the jury that criminal intent could be proven by circumstantial evidence and that it was permissible for the jury to draw the inference that a person ordinarily intends the natural and probable consequences of his acts knowingly done (22a). At the conclusion of the charge, Mustacchio's counsel objected to the "natural and probable consequences" instruction, on the ground that it allowed the jury to find the requisite intent to influence official conduct solely from the fact of payment of the money. The court excused the jury and directed them not to begin their deliberations. After an extended discussion, agreement was reached between the court and defense counsel as to the content of a corrective instruction (48a-57a). The jury was called back and the court then gave the following instruction, which counsel for both petitioners accepted as satisfactory (66a; Pet. App. A, p. 3 fn.):

> * * * I am instructing you now to ignore that instruction [that a person ordinarily intends the natural and probable consequences of his actions knowingly done] and accept this: In seeking out the element of intent you and you alone draw the inferences and the inferences that you may draw should be drawn from all of the evidence and all of the facts knowingly done. I do not suggest and I did not mean to suggest by the instruction

that I gave you before that any particular act would require you to draw an inference of criminal intent. I do not suggest in any way the inferences that you are to draw. I merely say in respect to the existence or non-existence of criminal intent you must look to all of the evidence * * * to all of the acts on the part of either defendant in connection with his innocence or guilt which were knowingly done.

I have also stated to you in connection with a corrupt payment that if you find that there was a payment of money to Agent Lally by a defendant with criminal intent to induce him and other agents of the Federal Bureau of Investigation, while they were engaged in the performance of their official duties, to do or omit any act in discharge of such duties, such payment of money would be an act corruptly done. Here again I instruct you that you are not to confine yourselves to the payment of money alone, if you find that money was paid, but you are to consider all facts and all circumstances as developed by the evidence, and it is your exclusive province to determine the reasonable inferences to be drawn, and it is your exclusive province to draw those inferences.

I do not suggest nor have I intended to suggest to you inferences, if any, you should draw from any particular act * * * in this case, so bear that in mind, and I instruct you that insofar as my previous charge indicated that you might consider the payment of money as a corrupt act of bribery, I advise you to ignore that. You may take it into consideration together with all other acts and all other circumstances in the determination of whether there was criminal inent * * * [63a-64a.]

ARGUMENT

1.a. Petitioners contend (Pet. 6-13) that the court's instructions on the specific intent to influence official conduct required by 18 U.S.C. 201(b) were insufficient. The court of appeals properly held that petitioners' failure to object to the charge given precludes any such attack. *United States* v. *Provenzano*, 334 F.2d 678 (C.A. 3); *United States* v. *Indiviglio*, 352 F.2d 276 (C.A. 2), certiorari denied, 383 U.S. 907; *Weldon* v. *United States*, 183 F.2d 832 (C.A.D.C.), certiorari denied, 343 U.S. 967. There is in any event no substance to their argument that the instructions were defective. Contrary to petitioners' assertion (Pet. 12), the proof clearly showed the "specific duties of the agents which the defendants were allegedly seeking to influence"—namely their duty to keep petitioner Restaino in custody. The court adequately instructed the jury as to the duties of the agents and properly charged that the "basic fact which is material is whether or not there was improper criminal conduct on the part of either of the defendants or both by way of bribery to secure the release of the defendant Restaino from custody" (23a-24a).

b. Although 18 U.S.C. 201(b) applies to any person who: "*directly or indirectly*, corruptly gives, offers or promises anything of value to any public official * * * with intent (1) to influence any official act" (emphasis added), the court also charged that, with respect to petitioner Mustacchio, the jury could also consider the effect of the provisions punishing as a

principal one who aids and abets the commission of a crime (18 U.S.C. 2), since the evidence showed that Mustacchio had not given the $1,000 directly to the agents (30a-32a). While the instruction may have been unnecessary in light of the language of Section 201(b), it was not prejudicial or confusing. As the court below held (Pet. App. A, 4), in the absence of any objection thereto, the giving of the aiding and abetting instruction did not rise to the level of plain error warranting reversal.

2. Petitioner Mustacchio also argues that he was denied the right to the effective assistance of counsel because the attorney whom he ultimately retained had been contacted only the day before the case was set for trial, and the trial judge refused to grant a continuance to allow more time to prepare the defense. The contention is fully answered in the opinion below (Pet. App. A, 5-7). As is there made clear, the record shows that Mustacchio had previously been granted two continuances to obtain counsel; that counsel finally chosen was the third lawyer to represent him in these proceedings; and that he defended Mustacchio "in a highly competent and professional manner" (Pet. App. A, 6). The trial court could reasonably conclude that Mustacchio was playing a "cat and mouse" game with the court regarding the matter of representation, in an effort to delay the trial. Moreover, the issues in the case were quite simple, the only possible witnesses being the two defendants and the agents. In these circumstances there was no abuse of discretion in denying a continuance.

3. Petitioner Restaino contends that the five-year sentence imposed on him was too severe. The sentence was, however, only one-third the allowable maximum for violation of 18 U.S.C. 201(b) and was fully merited by the evidence. The court took into account that Restaino "played a lesser role" by giving him a lesser sentence than that imposed on petitioner Mustacchio.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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